

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants: Thomas Lummis, *et al.*

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For: COVER FOR MODULES OF FIBROUS
MATERIALS§
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Group Art Unit: 3781

Examiner: Mai, Tri M.

Confirmation: 5873

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CERTIFICATE OF EFS-WEB FILING

Pursuant to 37 C.F.R. §1.8, I hereby certify that this correspondence is being electronically submitted to the U.S. Patent and Trademark Office website, www.uspto.gov, on August 21, 2009.


James Candelas**REPLY BRIEF**

Dear Sirs:

Appellants submit this Reply Brief in support of the appeal instituted in the above-referenced application (by the Notice of Appeal filed February 19, 2009, and in support of the Appeal Brief filed April 20, 2009) and in response to the Examiner's Answer mailed June 23, 2009 (hereinafter the "Examiner's Answer"). Appellants authorize all required fees under 37 C.F.R. § 1.17 to be charged to Deposit Account No. 50-1515, of Conley Rose, P.C. of Texas.

TABLE OF CONTENTS

I.	STATUS OF CLAIMS.....	3
A.	Total Number of Claims in the Application.	3
B.	Status of All Claims in the Application.	3
C.	Claims on Appeal.	3
II.	GROUNDS FOR REJECTION TO BE REVIEWED ON APPEAL.....	4
III.	ARGUMENT	5
1.	A statement that the invention is “contrary to the laws of physics” is not a proper ground for a 35 U.S.C. 112 rejection for indefiniteness	
2.	Conclusory statements are insufficient for obviousness rejections	
3.	Regarding the Examiner’s rationale for obviousness, it improperly begs the question when the Examiner says that elimination of one support from the prior art is obvious to save material since its function is not desired	
4.	Although the Frieder reference was cited as teaching several claim elements, it does not actually teach these elements	
5.	Declaration evidence cannot be ignored	
IV.	CONCLUSION.....	11

I. STATUS OF CLAIMS

A. Total Number of Claims in the Application.

Claims in the application: 1-16.

B. Status of All Claims in the Application.

1. Claims canceled: None.

2. Claims withdrawn from consideration but not canceled: 16.

3. Claims pending: 1-15.

4. Claims allowed: None.

5. Claims rejected: 1-15.

6. Claims neither rejected nor allowed: None.

C. Claims on Appeal.

The claims on appeal are: 1-15.

II. GROUND FOR REJECTION TO BE REVIEWED ON APPEAL

1. Whether claims 1-15 are indefinite under 35 U.S.C. §112, second paragraph.
2. Whether claim 8 is obvious under 35 U.S.C. §103(a) over *Porter* (U.S. Patent 5,904,243), or alternatively, over *Porter* in view of *Frieder* (U.S. Patent 3,011,820).
3. Whether claims 1-3, 5, 6, 9-11, and 13-15 are obvious under §103(a) over *Porter* in view of either *Horwath* (U.S. Published Application 2003/0226846) or *Gallagher* (U.S. Patent 4,308,905).
4. Whether claims 4, 7, and 12 are obvious under 103(a) over *Porter* in view of either *Campbell* (U.S. Patent 2,705,461) or *Frieder*.

III. ARGUMENT

In response to the Examiner's Answer mailed on June 23, 2009, Appellants submit this Reply Brief. This Reply Brief is provided to clarify the issues on appeal by noting specific errors in the Examiner's Answer and in support of the traversal of the various grounds of rejection as previously presented in the Appeal Brief. Since the Appeal Brief has previously attempted to address the grounds of rejection in a comprehensive and structured manner, this Reply Brief will instead provide supplementary points responding individually to specific errors in the Examiner's Answer as follows:

1. **A statement that the invention is “contrary to the laws of physics” is not a proper ground for a 35 U.S.C. 112 rejection for indefiniteness**

The Examiner has rejected claims 1-15 under 35 USC 112 “as being indefinite for failing to particularly point out and distinctly claim the subject matter which appellant regards as the invention.” The Examiner has not, however, indicated any actual indefiniteness. Instead, the only reason given for this rejection is the Examiner's belief that the invention “is contrary to the laws of physics.” It bears repeating (from the Appeal Brief) that this is not a proper reason for a 112 rejection, since it is not related to the definiteness of the claim scope.

A person skilled in the art would clearly understand the claim limitations and the scope of the invention being claimed by Appellants. Indeed, the Examiner clearly understands the scope of the claimed invention, but simply does not believe that the claimed invention is an improvement over the prior art. Since the scope of the claim is clear, there can be no rejection for indefiniteness. *See MPEP 2171 and Metabolite Lab.,*

Inc. v. Laboratory Corp, 370 F.3d 1354, 1366 (Fed. Cir. 2004).¹ Accordingly, Appellants respectfully request withdrawal of this improper 112 rejection.

2. Conclusory statements are insufficient for obviousness rejections

There appears to be a reliance on conclusory statements throughout the Examiner's Answer. By way of example, in paragraph no. 1 (on page 3) and paragraph no. 5 (on pages 6 and 7) of the Examiner's Answer, the Examiner has indicated that "to assert that the single point as compared to multiple points of support would increase the holding strength of the cover on the bale would run counter to the laws of physics," without offering any actual evidence in support of this supposition. These appear to be conclusory statements based solely on the Examiner's gut feeling, since no calculations have been offered in support. As the U.S. Supreme Court noted in *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 127 S.Ct. 1727 (No. 04-1350, 2007), however, "rejections on obviousness grounds cannot be sustained by mere conclusory statements."

Similarly, in paragraph no. 3 (on page 5) of the Examiner's Answer, the Examiner has indicated that "it would have been obvious to one of ordinary skill in the art to eliminate the rings so the strap are threaded through the first and second support straps to save material." Again, this appears to be a conclusory statement made without support, and this supposition assumes that it would be obvious that eliminating the rings would not negatively impact functionality. But, "rejections on obviousness grounds cannot be

¹ And regardless, as previously noted in the Appeal Brief, the evidence specifically demonstrates that the superiority of Appellants' invention, while surprisingly unexpected, is nevertheless true.

sustained by mere conclusory statements.” *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 127 S.Ct. 1727 (No. 04-1350, 2007).

3. Regarding the Examiner’s rationale for obviousness, it improperly begs the question when the Examiner says that elimination of one support from the prior art is obvious to save material since its function is not desired

Despite the fact that the Examiner’s own initial reaction to the present invention is that it “contradicts the laws of physics,” the Examiner has nevertheless also attempted to argue that the present invention is obvious, stating in paragraph no. 2 on page 4 of the Examiner’s Answer that it would be obvious to eliminate one of the straps on each side of the prior art cover to save material since the function of that eliminated strap is not desired. This argument is misleading, however, since it was not at all obvious at the time of invention that the function of the eliminated strap was not desired. As noted in the declaration evidence and in the Examiner’s own characterization of the invention as violating the laws of physics, persons of skill at the time of invention would have expected additional straps to provide additional strength. Since the goal of these module covers is to stay in place atop a module, there was nothing in the prior art that would suggest the desirability of eliminating the supposed function of a strap. It was simply not obvious at the time of invention that the strength of attachment might be improved by eliminating straps (indeed this idea ran counter to the accepted logic, and it so boggles the Examiner’s mind that he continues to state that it violates the laws of physics despite good evidence to the contrary). And as noted in the Appeal Brief, the notion that a person of skill might eliminate the strap simply to save material is a red herring, since no rational person would

be motivated to modify a module cover in a way that they believed would weaken its ability to stay in place (since the amount that might be saved by eliminating the material of a strap is insignificant compared to the cost associated with failure of the cover due to weakened attachment). The presently claimed invention cannot properly be deemed obvious, since there is no legitimate rationale that would have led a person of skill at the time of invention towards this invention.

4. Although the *Frieder* reference was cited as teaching several claim elements, it does not actually teach these elements

In paragraph no. 2 (page 4) of the Examiner's Answer, the Examiner attempts to argue that Figure 1 of *Frieder* teaches that "it is known in the art to provide the sides with only one support." As previously noted, however, Figure 1 of *Frieder* seems to show multiple supports (actually 3 supports) per side. So clearly, *Frieder* does not teach this claim element.

On page 8, the Examiner also attempts to argue that "either Campbell or Frieder teaches that it is known in the art to provide diamond shaped loops." Appellants note that the diamond-shaped loops at issue in the present invention (as in claim 4) refer to the single support strap per side, which is used to attach the cover in place on the module via the securing strap. The only diamond-shaped element in *Campbell* or *Frieder* referenced by the Examiner, however, is the cargo netting itself. The attachment points in *Frieder* are not shown as being diamond shaped (see for example, Figs. 3 and 9), while *Campbell* teaches only alternate cables at alternate points to form a grid pattern in the net (with no reference

to diamond shaped attachment points at all). So, diamond-shaped support straps are not actually taught by the cited references.

There certainly is no teaching in these cited references regarding folding fabric to form a diamond-shaped support strap (as required by the claim language). And as noted previously, these references would not lead a person of skill to the present invention at any rate, since the open mesh of the cargo netting in *Frieder* and *Campbell* would not be instructive with regard to the types of wind uplift forces at issue in the present invention (see the Appeal Brief for a more detailed argument on this point).

5. Declaration evidence cannot be ignored

The Examiner seems to be trying to ignore the evidence presented in the declarations, offering the excuse of nexus as a rationale for hostility towards this evidence. But the declarations provide sufficient nexus, as explained in detail in the Appeal Brief. After all, the Taubert declaration specifically indicates that the Porter cover of the prior art is essentially the same as the present invention except that it uses multiple straps per side (and despite the fact that the Examiner would like to assume that performance differences resulted from the presence of other features, the declaration evidence clearly states that the only real difference was the number of straps), explains that side-by-side field tests occurred under similar conditions in the field during overlapping time periods, and indicates that both types of covers were installed by Mr. Taubert's company (which is expert in the field and which is an independent third party whose self interest in protecting the crop would lead to proper installation). Furthermore, any concerns over minor variances in conditions experienced by individual covers are negligible given the large test

sample size (of over 1,000 of each product) and the extreme performance gap (represented by the 40% improvement in retention).

Instead, the nexus argument appears to just be an excuse to ignore valid evidence that the Examiner does not like, as particularly demonstrated by the statement on page 8 of the Examiner's Answer that declarations "cannot take the place of evidence." Appellants note for the record that the declarations *are* evidence, with the Taubert declaration (for example) providing reliable third-party eyewitness testimony. This testimony regarding the results of real world field testing clearly is relevant evidence that goes to the heart of the matter, and it cannot be ignored. Consequently, the Taubert declaration is strong evidence of non-obviousness, which must be fully credited and which conclusively proves that the present invention is unexpectedly superior to the prior art (especially since there is no countervailing evidence, as the Examiner's only attempt to refute the declaration is a conclusory statement that the invention violates the laws of physics).

IV. CONCLUSION

There has been no demonstration of proper §112 grounds for rejection, since the Examiner has not shown that the scope of the claims would be unclear to persons skilled in the art field. Furthermore, both the submitted evidence and the Examiner's own reaction of incredulity demonstrate the non-obviousness of the presently claimed one-strap-per-side invention over the cited *Porter* reference. And the irrelevant secondary references would not lead persons of skill to modify *Porter* towards the present invention. It seems that the Examiner's rejection is actually based on nothing more than a gut feeling, as summed up in the conclusory statement that the alleged superiority of the invention "contradicts physics laws." But an obviousness rejection cannot legally be sustained by such a conclusory statement. Rather, the strong declaration evidence clearly demonstrates that the presently claimed invention is indeed more than an obvious improvement over the cited prior art.

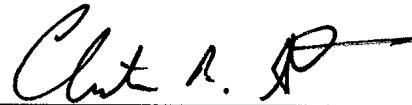
It is believed that each ground of rejection raised in the Final Office Action dated December 17, 2008 and the Examiner's Answer dated June 23, 2009 has been fully addressed by the Appeal Brief of April 20, 2009 and this Reply Brief. In view of the arguments therein, the Appellants respectfully request that the final rejection of the claims be reversed and the case advanced to issue. Should the Examiner feel that a telephone interview would advance prosecution of the present application, the Appellants invite the Examiner to call the attorneys of record.

The Commissioner is hereby authorized to charge payment of any further fees associated with any of the foregoing papers submitted herewith, or to credit any overpayment thereof, to Deposit Account No. 50-1515, of Conley Rose, P.C. of Texas. It

is believed that no extensions of time or fees are required, beyond those that may otherwise be provided for in documents accompanying this paper. However, in the event that additional extensions of time are necessary to allow consideration of this paper, such extensions are hereby petitioned under 37 C.F.R. 1.136(a), and any fees required are hereby authorized to be charged to the Deposit Account set forth above. If petition for extension of time is necessary for this paper to be deemed timely filed, please consider this a petition therefore.

Respectfully submitted,

CONLEY ROSE, P.C.



Date: August 21, 2009

5601 Granite Parkway, Suite 750
Plano, Texas 75024
Telephone: (972) 731-2288
Facsimile: (972) 731-2289

Clinton R. Stuart
Reg. No. 48,859

ATTORNEY FOR APPELLANTS